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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK FUNDERBURK,

Plaintiff - Appellant,

v.

E. K. MCDANIEL; et al.,

Defendants - Appellees.

No. 07-17224

D.C. No. CV-06-00231-RCJ-RAM

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Nevada  
Robert C. Jones, District Judge, Presiding

Submitted December 17, 2008<sup>\*\*</sup>

Before: GOODWIN, WALLACE, and RYMER, Circuit Judges.

Patrick Funderburk, a Nevada state prisoner, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging constitutional

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violations arising from his confinement in administrative segregation and an altercation with his cellmate. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam), and we affirm.

The district court properly dismissed Funderburk's due process claim because he did not show that he had a protected liberty interest in being free from confinement in administrative segregation. *See Resnick v. Hayes*, 213 F.3d 443, 447-48 (9th Cir. 2000) (dismissing due process claim where the plaintiff failed to allege any material difference between the conditions in administrative segregation and the conditions in the general population).

The district court properly dismissed Funderburk's Eighth Amendment claim because his allegations were insufficient to state a claim for failure to protect. *See Farmer v. Brennan*, 511 U.S. 825, 835-39, 843 (1994) (explaining that a prison official is not liable for failing to protect one inmate from another unless the prisoner shows that he was housed under conditions that posed a substantial risk of serious harm, and that the prison official acted with deliberate indifference to the prisoner's safety).

The district court properly dismissed Funderburk's claims against the warden defendants to the extent they were based on respondeat superior liability.

*See Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993) (explaining that there is no respondeat superior liability under § 1983).

**AFFIRMED.**